

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

DAMIEN RIVERO,

Plaintiff,

vs.

JACKIE CRAWFORD, ET AL.,

Defendants.

CV-N-04-0495-HDM (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

August 16, 2006

This Report and Recommendation is made to the Honorable Howard D. McKibben, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#67). Plaintiff opposed (#71), filed a supplemental opposition (#75), and a second supplemental opposition (#80).

The court has thoroughly reviewed the record and the motion and recommends that the motion be granted in part and denied in part.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Damien Rivero is a prisoner at Ely State Prison ("ESP") in the custody of the Nevada Department of Corrections ("NDOC") (#8). Plaintiff brings this complaint pursuant to 42 U.S.C. § 1983, alleging prison officials violated his First Amendment rights to be free from retaliation and to access the courts, his Eighth Amendment right against cruel and unusual punishment and his Fourteenth Amendment right to due process. *Id.* Plaintiff names as defendants Jackie Crawford, NDOC director; E.K. McDaniel, ESP warden; D.W. Neven,

1
2 associate warden of operations; Jack Garchow, correctional officer; Walter Romero, senior
3 Corrections Emergency Response Team (“CERT”) officer; Chad Oxborrow, CERT officer;
4 Jeffrey E. Eldridge, CERT officer; Richard D. Falge, lieutenant; and Martin Neagle, lieutenant.¹
5
6 *Id.*

7 In count I, plaintiff alleges that prison officials violated his Eighth Amendment right
8 against cruel and unusual punishment by formulating policies authorizing the use of force on
9 restrained inmates. *Id.* Plaintiff also claims that while he was in restraints, defendant Garchow
10 slammed plaintiff to the ground, repeatedly slammed his head on the ground, punched plaintiff
11 with a closed fist and, along with other officers, jumped on plaintiff’s back. *Id.* Plaintiff claims
12 he suffered injuries to his face and lower back. *Id.*

14 In count II, plaintiff alleges that defendants violated his Fourteenth Amendment right to
15 due process. *Id.* Plaintiff claims that Garchow filed a false disciplinary report in May 2004. *Id.*
16 Plaintiff contends that officials held a disciplinary hearing and found that he had made threats and
17 behaved in a disruptive manner, despite a lack of evidence. *Id.* Plaintiff also claims that
18 defendant Neagle violated plaintiff’s due process rights when, pursuant to a disciplinary hearing,
19 Neagle found that plaintiff had intentionally damaged the light in his cell. *Id.* Plaintiff apparently
20 argues that he did not damage the light. *Id.* Plaintiff states that he filed grievances requesting that
21 prison officials photograph the light for the disciplinary hearing, but no photos were taken. *Id.*
22
23
24

25
26 ¹Plaintiff filed his original complaint on December 10, 2004 (#5). The court dismissed several
27 claims for insufficiency (#3). Plaintiff filed his amended complaint on April 20, 2005 (#8). Plaintiff moved
28 for a preliminary injunction on August 11, 2005, which the Court denied (#s 44, 51).

1
2 In count III, plaintiff claims that prison staff violated his First Amendment rights to
3 petition for redress of grievances by submitting false disciplinary reports to retaliate against
4 plaintiff for grievances he filed. *Id.* Plaintiff also alleges that in May 2004, prison staff searched
5 his cell and falsely reported that they discovered a razor blade. *Id.* Plaintiff argues that they
6 planted the blade in retaliation for grievances plaintiff filed requesting that all cell searches be
7 videotaped. *Id.* Finally, plaintiff claims that defendants Romero, Oxborrow and Eldridge tore
8 up plaintiff's legal documents under the pretext of removing staples in order to prevent plaintiff
9 from litigating his legal claims. *Id.*

10
11 Defendants move for summary judgment (#67-1).

12 II. DISCUSSION & ANALYSIS

13 A. Discussion

14 1. Summary judgment

15
16 Summary judgment allows courts to avoid unnecessary trials where no material factual
17 disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dep't of Agriculture*, 18 F.3d 1468, 1471 (9th
18 Cir. 1994). In deciding whether to grant summary judgment, the court must view the evidence
19 and any inferences arising from the evidence in the light most favorable to the nonmoving party.
20 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). The court grants summary judgment if
21 no genuine issues of material fact remain in dispute and the moving party is entitled to judgment
22 as a matter of law. FED. R. CIV. P. 56(C). Judgment as a matter of law is appropriate where there
23 is no legally sufficient evidentiary basis for a reasonable jury to find for the nonmoving party.
24 FED. R. CIV. P. 50(a). Where reasonable minds could differ on the material facts at issue,
25
26
27
28

1 however, summary judgment should not be granted. *Warren v. City of Carlsbad*, 58 F.3d 439,
2 441 (9th Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996).

3 The moving party bears the burden of informing the court of the basis for its motion, and
4 submitting evidence which demonstrates the absence of any genuine issue of material fact.
5 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
6 the party opposing the motion may not rest upon mere allegations or denials in the pleadings but
7 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson v.*
8 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

9
10 Only evidence which might be admissible at trial may be considered by the court in ruling
11 on a motion for summary judgment. FED. R. CIV. P. 56(c); *Beyene v. Coleman Security Services,*
12 *Inc.*, 854 F.2d 1179, 1181 (9th Cir. 1988). Evidence without a proper foundation cannot support
13 a motion for summary judgment. *Canada v. Blain's Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir.
14 1987).

15
16 Material facts are facts that might affect the outcome of the case; the court determines
17 materiality by reference to the substantive law that controls the case. *Anderson*, 477 U.S. at 248.
18 Disputes over irrelevant or unnecessary facts should not be considered. *Id.* If, given the evidence
19 submitted, a reasonable jury could hold for the nonmoving party, the dispute over material fact
20 is "genuine." *Id.* Where there is a complete failure of proof on an essential element of the case
21 for the nonmoving party, all other facts become immaterial, and the moving party is entitled to
22 judgment as a matter of law. *Celotex*, 477 U.S. at 323.

23 **2. Excessive force**

24
25 The Eighth Amendment prohibits the imposition of cruel and unusual punishments and
26 "embodies broad and idealistic concepts of dignity, civilized standards, humanity and decency."
27

1 *Estelle v. Gamble*, 429 U.S. 97, 102 (1976) (citation and internal quotations omitted); *see also*
2 *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Spain v. Procunier*, 600 F.2d 189, 200 (9th Cir. 1979).
3 When an inmate alleges that a prison officer used excessive physical force in violation of the
4 Eighth Amendment “the core judicial inquiry is . . . whether force was applied in a good-faith
5 effort to maintain or restore discipline, or maliciously and sadistically to cause harm.” *Hudson*
6 *v. McMillian*, 503 U.S. 1, 6-7 (1992); *see also Jeffers v. Gomez*, 267 F.3d 895, 899 (9th Cir.
7 2001).

9 Where prison officials have acted in response to an immediate disciplinary need, because
10 of the risk of injury to inmates and prison employees and because prison officials will not have
11 time to reflect on the nature of their actions, the “malicious and sadistic” standard, as opposed to
12 the “deliberate indifference” standard, applies. *See Whitley v. Albers*, 475 U.S. 312, 320-21
13 (1986); *Jordan v. Gardner*, 986 F.2d. 1521, 1528 (9th Cir. 1993) (en banc). Because the use of
14 force relates to the prison official’s legitimate interest in maintaining security and order, the court
15 must be deferential when reviewing the necessity of using force. *See Whitley*, 475 U.S. at 321-22.
16 *But see McRorie v. Shimonda*, 795 F.2d 780, 784 (9th Cir. 1986) (describing circumstances in
17 which the prison official’s use of force was unconstitutionally excessive).

19 In order to determine whether the force was excessive, the court looks to the “extent of
20 injury . . . the need for application of force, the relationship between that need and the amount of
21 force used, the threat ‘reasonably perceived by the responsible officials,’ and ‘any efforts made
22 to temper the severity of a forceful response.’” *Hudson*, 503 U.S. at 7, quoting *Whitley*, 475 U.S.
23 at 321.
24
25
26
27
28

3. Retaliation

“[T]here is no iron curtain drawn between the Constitution and the prisons of this country.” *Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974). Prison officials may be sued under § 1983 for retaliating against a prisoner for exercising his or her constitutional rights. *Bruce v. Ylst*, 351 F.3d 1283, 1288 (9th Cir. 2003). To establish a prima facie case of retaliation under § 1983, the inmate-plaintiff must allege: (1) that he was retaliated against for exercising a constitutional right, and (2) that the alleged retaliatory action did not advance legitimate penological goals, such as preserving order and discipline. *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (*per curiam*). Such claims must be evaluated in light of the deference that must be accorded to prison officials. *Pratt v. Rowland*, 65 F.3d 802, 807 (9th Cir. 1995). The prisoner must submit evidence to establish a link between the exercise of constitutional rights and the allegedly retaliatory action. *Id.* The inmate bears the burden of pleading and proving the absence of legitimate correctional goals for the alleged retaliatory action. *Id.* at 806. Finally, the inmate must demonstrate that the defendants’ actions caused him actual injury. *See Resnick v. Hayes*, 213 F.3d 443, 439 (9th Cir. 2000).

4. Due process

The procedural guarantees of the Fourteenth Amendment’s Due Process Clause apply only when a constitutionally-protected liberty interest is at stake. *See Tellis v. Godinez*, 5 F.3d 1314, 1316 (9th Cir. 1995). Liberty interests can arise both from the Constitution and from state law. *Wolff v. McDonnell*, 418 U.S. 539, 557-58 (1974). When deciding whether the Constitution itself protects an alleged liberty interest of a prisoner, the court should consider whether the practice or sanction in question “is within the normal limits or range of custody which the conviction has authorized the State to impose.” *Meachum v. Fano*, 427 U.S. 215, 225 (1976).

1 When a prisoner faces disciplinary charges, prison officials must provide the prisoner with
 2 (1) a written statement at least twenty-four hours before the disciplinary hearing that includes the
 3 charges, a description of the evidence against the prisoner, and an explanation for the disciplinary
 4 action taken; (2) an opportunity to present documentary evidence and call witnesses, unless
 5 calling witnesses would interfere with institutional security; and (3) legal assistance where the
 6 charges are complex or the inmate is illiterate. *See Wolff v. McDonnell*, 418 U.S. 539, 563-70
 7 (1974); *Neal v. Shimoda*, 131 F.3d 818, 830-31 (9th Cir. 1997). Prison officials must make
 8 individualized determinations to limit the calling of witnesses, *see Mitchell v. Dupnik*, 75 F.3d
 9 517, 525 (9th Cir. 1996), and must eventually explain their reasons for so limiting the prisoner's
 10 ability to defend her or himself, *see Ponte v. Real*, 471 U.S. 491, 497 (1985).
 11

12
 13 “[T]he requirements of due process are satisfied if some evidence supports the decision
 14 by the prison disciplinary board” *Superintendent v. Hill*, 472 U.S. 445, 455 (1985); *see also*
 15 *Toussaint v. McCarthy*, 926 F.2d 800, 802-03 (9th Cir. 1991). Prisoners have no automatic right
 16 to counsel in prison disciplinary hearings, but if the inmate is illiterate, the issues are complex,
 17 or the prisoner is unable to gather evidence, the prisoner must be provided with some legal
 18 assistance. *See Vitek v. Jones*, 445 U.S. 480, 495-96 (1980).
 19

20 **B. Analysis**

21 **1. Excessive force**

22 First, defendants argue that no NDOC policy exists that allows correctional staff to “slam”
 23 inmates to the ground (#67-1). Defendants provide the institutional procedures governing use of
 24 force as well as the protocol for handling High Risk Potential (“HRP”) inmates (#65, Ex. A, B,
 25 submitted under seal). They also provide responses to interrogatories by defendants Crawford,
 26 McDaniel, and Neven (#67, Ex. C, D, E). Plaintiff offers only his own bare assertion that such
 27
 28

1 policy exists (#s 71, 75, 80).

2 Nothing in the ESP institutional procedures indicates that a policy exists that permits
3 prison staff to “slam” inmates to the ground, whether or not the inmates are restrained. In their
4 responses to interrogatories, Warden McDaniel and Associate Warden of Programs Neven state
5 that staff is not trained to slam inmates to the ground and that staff is trained to use only the
6 amount of force necessary to restore order and prevent injury to staff or inmates (#67, Ex. D, E).
7 Plaintiff offers no evidence to support his claim, other than his own conclusory affidavit.
8 Accordingly, defendants’ motion for summary judgment is granted as to plaintiff’s claim that a
9 policy exists that allows prison staff to slam inmates to the ground.
10

11 Second, defendants argue that Garchow did not use excessive force against plaintiff (#67).
12 Defendants contend that Garchow was required to use force when plaintiff suddenly lunged at
13 him, that Garchow used an appropriate amount of force to place plaintiff on the ground, that
14 Garchow reasonably perceived a threat, that he did not have time to temper the severity of the
15 force, and that plaintiff suffered only *de minimus* injuries. *Id.*; *Hudson*, 503 U.S. at 7, quoting
16 *Whitley*, 475 U.S. at 321. Defendants provide affidavits of Garchow and the other two officers
17 that were escorting plaintiff when the incident occurred (#67, Ex. H, J, K). Defendants also
18 include Garchow’s responses to interrogatories, the medical report on the incident, and a
19 videotape that documents the period after the incident when plaintiff was held on the floor and
20 then examined by medical staff (#67, Ex. F, G, I).
21

22 Plaintiff offers his affidavit as evidence in support of his version of events (#71, pp. 24-
23 40). Plaintiff claims that as he was being led to the shower in full restraints, he told Garchow that
24
25
26
27
28

1 he was holding plaintiff's arm too tightly.² *Id.* Plaintiff contends that he made no threatening
2 physical gestures, but that Garchow slammed him to the ground and landed on top of him. *Id.*
3 Plaintiff asserts that though he offered no resistance Garchow repeatedly slammed his head into
4 the ground and then punched him in the head once with a closed fist. *Id.* Plaintiff provides the
5 affidavits of two inmates who state that they witnessed the event (#71, pp. 38-39). Inmate
6 Paliotta attests to a similar version of events as plaintiff recounts; inmate Ochoa adds that he
7 observed the other two officers kick plaintiff in the back three or four times.³ *Id.*

9 The court finds that a genuine issue of material fact exists as to whether Garchow used
10 excessive force against plaintiff. Plaintiff acknowledges that he and Garchow do not get along
11 and have had ten or fifteen "incidents" involving assault or threats in 2004-2005 (#80, plaintiff's
12 deposition, pt. 2 at 39). However, plaintiff asserts that many of those incidents involve false
13 write-ups by Garchow. *Id.* Plaintiff and Garchow's version of the events in question clearly
14 differ, and both sides provide evidence in the form of supporting affidavits. Defendants
15 characterize plaintiff's injuries as *de minimus*; however, the court notes that the video was filmed
16 from too far away for a clear view of plaintiff's injuries and that, in any event, the extent of his
17 injuries is not dispositive. Accordingly, defendants' motion for summary judgment as to
18 plaintiff's claim that excessive force was used is denied.
19
20
21
22
23

24 ²Plaintiff claims that Garchow was holding his bicep too tightly as a form of sexual harassment (*See*,
25 *e.g.*, #71, plaintiff's affidavit at 28; #67, Ex. N at 30).

26 ³These allegations resemble plaintiff's version of events in his amended complaint, in which he
27 claims that "between [Garchow] and the officers that were with him begin to hit and jump on plaintiff's
28 back" (#8). Plaintiff does not mention any acts of force by the other two officers in his several oppositions
to summary judgment or in his deposition (*See* #s 71, 75, 80, 67, Ex. N).

2. Retaliation

Defendants argue that plaintiff's cell was searched pursuant to the institutional procedure that requires random cell searches on a regular basis (#67, Ex. O, submitted under seal). Defendants provide search logs that indicate that plaintiff's cell was randomly searched in the past and currently. *Id.*, Ex. P. Defendants assert that the "legal documents" that plaintiff claims were destroyed were in fact grievances belonging to other inmates that constituted contraband because plaintiff obtained the grievances in violation of ESP regulations (#67). Defendants contend that the fact that plaintiff continues to file numerous grievances demonstrates that the searches have not chilled his exercise of his First Amendment rights. *Id.*

Plaintiff argues that defendants' claim that the searches were mandated by institutional procedures is pretextual and that plaintiff was targeted for cell searches in retaliation for stating at his disciplinary hearing that the guards have a policy of using excessive force against restrained inmates (#71, plaintiff's affidavit at 30).

Defendants submitted numerous copies from the cell shake-down log that show that plaintiff's cell was routinely searched between 2003 and 2005 (#71, Ex. P). Plaintiff stated in his deposition that the "legal documents" he claims that defendants destroyed were other inmate's grievances that he intended to use in his litigation (#67, Ex. N at 22). Plaintiff admits that he obtained the grievances in violation of ESP regulations by passing a string under another inmate's cell door, a technique known as the "Cadillac." *Id.* at 28-31. However, plaintiff claims that he is not prohibited from possessing copies of other inmate's grievances generally, *id.*, which defendants do not address.

Defendants do not provide any documentation regarding the searches in which the damaged light or razor blade were allegedly discovered. On May 29, 2004, plaintiff submitted

1 a grievance in which he complained that after his disciplinary hearing regarding the incident with
2 Garchow, defendants searched his cell in retaliation and filed a false disciplinary report stating
3 that plaintiff had cut the plexiglass on his cell light (#71, Ex. E). The response states: “The
4 physical evidence includes scratches on your cell light cover and deep cuts in the floor of your
5 cell. You have lived in Cell 4B 15A since 6-16-03 and have been the sole inhabitant. You did
6 not report any damage to the light cover or the floor. This is sufficient evidence to find you guilty
7 of all charges.” *Id.*, Ex. F. Plaintiff submitted a grievance on June 17, 2004, which stated that
8 he felt he was being harassed during cell searches, expressed concern that prison guards would
9 plant a weapon or drugs in his cell, and requested that searches of his cell be videotaped. *Id.*, Ex.
10 G. On July 14, 2004, plaintiff stated in a grievance that on June 29, 2004, defendants Romero
11 and Oxborrow and another correctional officer destroyed plaintiff’s “legal documents” – other
12 inmates’ grievances – and filed a false report claiming that they found a razor blade in plaintiff’s
13 cell. *Id.*, Ex. H. While defendants argue that plaintiff obtained the grievances improperly, they
14 do not address the razor blade in their motion (*See* #67).

15
16
17 The court views plaintiff’s retaliation claim as setting forth three issues: 1) whether
18 plaintiff was subjected to retaliatory cell searches in general; 2) whether defendants filed a false
19 disciplinary report regarding the damaged cell light; and 3) whether during the June 29 search,
20 defendants improperly destroyed the other inmates’ grievances and filed a false disciplinary report
21 regarding the razor blade. The court finds that defendants have demonstrated that correctional
22 officers must conduct routine, random cell searches in accordance with ESP policy (#67, Ex. O,
23 submitted under seal). Thus, plaintiff has failed to meet his burden of pleading and proving the
24 absence of legitimate correctional goals for the alleged retaliatory cell searches. *Pratt*, 65 F.3d
25 at 806. Because deference must be accorded to prison officials when evaluating such claims, *id.*

1 at 807, the court also finds that no genuine issue of material fact exists with respect to whether
2 defendants filed a false disciplinary report regarding the damaged cell light. The grievance
3 response states that the cell light and floor were damaged, that plaintiff was the sole inhabitant
4 of the cell since 2003, and that plaintiff had not reported any damage (#71, Ex. F). In response,
5 plaintiff fails to set forth specific facts to show that a genuine factual issue exists (*See* #71, 75,
6 80; *Anderson*, 477 U.S. at 248).

8 As to the third issue, defendants offer no argument regarding plaintiff's allegations that
9 a razor blade was planted in his cell (*See* #67). Also, while plaintiff acknowledged that he
10 obtained the grievances improperly, defendants do not explain whether plaintiff was allowed to
11 possess the grievances. Accordingly, defendants' motion for summary judgment is granted as to
12 whether plaintiff was subjected to retaliatory searches generally and as to whether a false
13 disciplinary report was filed regarding the damaged cell light. Defendants' motion for summary
14 judgment is denied as to plaintiff's claim that during the June 29 search, his papers were
15 improperly destroyed and a razor blade was planted in his cell.

17 **3. Due process**

18 Defendants argue that plaintiff does not have a liberty interest in the disciplinary
19 proceedings, *Sandin v. Conner*, 515 U.S. 472, 484 (1995); but they also contend that even if
20 process was due, plaintiff was given an opportunity to present evidence and make statements in
21 his defense (#67, Ex. L, M). Plaintiff argues that defendants Neagle and Falge violated his due
22 process rights by finding him guilty of disciplinary violations without any evidence (#71).
23 Plaintiff also contends that he was not allowed to present evidence with respect to the notice of
24 charges for the damaged cell light. *Id.*

1 Defendants provide the summary of the May 21, 2004, disciplinary hearing arising from
2 the incident with Garchow, which indicates that plaintiff was found guilty of two of four charges
3 (#67, Ex. L). The summary states that plaintiff made a statement, that plaintiff's request to call
4 inmate Ochoa to make a statement was denied based on redundancy, and that the hearing officer,
5 apparently defendant Falge, based his determination of guilt on the notice of charges and
6 plaintiff's history of violence. *Id.*

8 The summary for the May 29, 2004, disciplinary hearing reflects that plaintiff was present,
9 that he made a statement, and that defendant Neagle's determination of guilt was based on
10 defendant Romero's written report stating that plaintiff's cell light cover had been cut (#67, Ex.
11 M). A third disciplinary hearing apparently took place, presumably arising from the notice of
12 charges for the search in which the razor blade was allegedly discovered. Defendants do not
13 provide a summary, and it appears that plaintiff refused to attend that proceeding (#80, plaintiff's
14 deposition, pt.1 at 27; #71, plaintiff's affidavit at 32-33).⁴

16 The court finds that the disciplinary proceedings satisfied plaintiff's due process rights
17 under *Wolff*. 418 U.S. at 563-70. Plaintiff does not dispute that he received the notice of charges
18 before each disciplinary hearing (#71).⁵ Plaintiff was allowed to make statements on his own
19 behalf at the hearings (#67, Ex. L, M). Defendant Fagle denied plaintiff's request to have inmate
20 Ochoa testify at the disciplinary hearing regarding the Garchow incident due to redundancy, a
21

23 ⁴Plaintiff states in his deposition that he did not attend the disciplinary hearing for the charges
24 relating to the damaged cell light (#80, plaintiff's deposition, pt. 1 at 27). However, it appears plaintiff
25 misspoke and meant to say that he did not attend the disciplinary hearing regarding the razor blade allegation
(*See* #71, plaintiff's affidavit at 32-33).

26 ⁵Again, there is a discrepancy between plaintiff's deposition and affidavit (*See* #80, plaintiff's
27 deposition, pt. 1 at 27; #71, plaintiff's affidavit at 32-33). However, plaintiff alleges that defendants filed
28 false disciplinary reports and he appears to have had knowledge of all charges.

1 conclusion born out by Ochoa's affidavit in this litigation. *Id.*; #71, Ex. I. Plaintiff complains
2 that he was not allowed to present evidence at the hearing regarding the damaged cell light and
3 presents the emergency grievance he filed on May 27, 2004, asking for photos to be taken of his
4 cell light (#71, Ex. D). The grievance was denied as a non-emergency, *id.*, yet plaintiff filed
5 another emergency grievance on May 28, 2004, which also was denied as improper (#71, Ex. D1).
6 Plaintiff did not have photos to present at this hearing; however, some evidence, in the form of
7 Romero's written report, supports the decision of the disciplinary board (#67, Ex. M; *Hill*, 472
8 U.S. at 455). Plaintiff acknowledged in his deposition that his due process claims amount to
9 dissatisfaction with the outcome of disciplinary proceedings (#80, plaintiff's deposition, pt. 1 at
10 24). Accordingly, defendants' motion for summary judgment is granted as to plaintiff's due
11 process claims.
12
13

14 III. CONCLUSION

15 Based on the foregoing and for good cause appearing, the court concludes that defendants
16 have demonstrated the absence of an issue of material fact as to plaintiff's due process claim, his
17 claim that NDOC has a policy authorizing excessive force, and his claim that he was subjected
18 to retaliatory cell searches and subjected to a retaliatory, false disciplinary report regarding the
19 damaged cell light. However, defendants have failed to demonstrate the absence of an issue of
20 material fact as to plaintiff's claim that he was subjected to excessive force and his claim that
21 defendants planted a razor blade in his cell. As such, the court recommends that defendants'
22 motion for summary judgment (#67) be granted in part and denied in part.
23
24

25 The parties are advised:

26 1. Pursuant to 28 U.S.C. § 636(b)(1)(C) and Rule IB 3-2 of the Local Rules of Practice,
27 the parties may file specific written objections to this report and recommendation within ten days
28

1 of receipt. These objections should be entitled "Objections to Magistrate
2 Judge's Report and Recommendation" and should be accompanied by points and authorities for
3 consideration by the District Court.

4 2. This report and recommendation is not an appealable order and any notice of appeal
5 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
6 judgment.
7

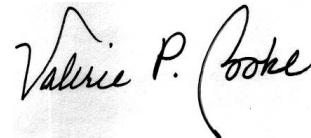
8 **III. RECOMMENDATION**

9 **IT IS THEREFORE RECOMMENDED** that defendants' motion for summary
10 judgment (#67) be **GRANTED in part** as to count I, plaintiff's claim that NDOC policy
11 authorizes excessive force against inmates, and **DENIED in part** as to count I, plaintiff's claim
12 that Garchow used excessive force against plaintiff.
13

14 **IT IS FURTHER RECOMMENDED** that defendants' motion for summary judgment
15 (#67) be **GRANTED** as to count II.

16 **IT IS FURTHER RECOMMENDED** that defendants' motion for summary judgment
17 (#67) be **GRANTED in part** as to count III, with respect to plaintiff's claims that he was
18 subjected to retaliatory cell searches generally and subjected to false disciplinary charges in
19 connection with the damaged cell light, and **DENIED in part** as to count III, with respect to
20 plaintiff's claim that a razor blade was planted in his cell.
21

22 **DATED:** August 15, 2006

23 
24

25

UNITED STATES MAGISTRATE JUDGE
26